INDEX.

PAGE

Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit 1

Opinions below 1

Jurisdiction 2

Questions presented 3

Statement of the case 7

Argument 15

Prayer 19

Appendix:

Memorandum opinion, findings of fact and conclusions of law of trial court 21

Judgment of the trial court 31

Opinion of the United States Court of Appeals for the Eighth Circuit 32

Judgment of the United States Court of Appeals for the Eighth Circuit 44

Petition for rehearing 45

Table of Cases.

Allis Chalmers Mfg. Co. v. Wichman, 220 F. 2d 426 2

Karstedt v. Phillip Gross Hdw. & Supply Co., 179 Wis. 110, 190 N. W. 844 ..... 18, 26

Lynch v. International Harvester Co., 60 F. 2d 223 ..... 18, 26

Stitt v. Huidekopers, 84 U. S. 384 ..... 15, 24

United States v. Yellow Cab Co., 338 U. S. 338, 70 S. Ct. 177, 179 17

Wichman v. Allis Chalmers Mfg. Co., 117 F. Supp. 857 2

Willey v. Fyrogas Co., 363 Mo. 406, 251 S. W. 2d 635, 640 ..... 18, 25

Winkler v. Macon Gas Co., 361 Mo. 1017, 238 S. W. 2d 386 ..... 18, 25

In the Supreme Court of the United States

October Term, 1954.

No.....

MARVIN WICHMAN, *Petitioner,*

vs.

ALLIS CHALMERS MANUFACTURING COMPANY, a Corporation, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now Marvin Wichman and respectfully prays the Court to issue its writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review its reversal of a judgment heretofore obtained by your petitioner against Allis Chalmers Manufacturing Company in the District Court of the United States for the Western District of Missouri, Western Division, and in support thereof, your petitioner respectfully shows:

Opinions Below.

Trial of petitioner's personal injury action against respondent before the Honorable Albert L. Reeves, Chief Judge of the United States District Court for the West-

ern District of Missouri, without the intervention of a jury, resulted in judgment of $50,000.00 in petitioner's favor (R. 22-23). Judge Reeves' memorandum opinion (R. 14-20) is reported, *Wichman* v. *Allis Chalmers Mfg. Co.,* 117 F. Supp. 857, and is reprinted as Appendix A to this petition, beginning at page 21.

The United States Court of Appeals for the Eighth Circuit reversed and remanded, its opinion appearing at pages 1 to 13 of the Appendix to the certified copy of the record filed herewith, and reported, *Allis Chalmers Mfg. Co., Appellant,* v. *Marvin Wichman, Appellee,* 220 F. 2d 426. The opinion is reprinted as Appendix B to this petition, beginning at page 32.

Grounds for Invocation of Jurisdiction.

The Court of Appeals filed its opinion herein April 1, 1955 (page 1, Appendix to certified copy of record). Judgment reversing and remanding was entered the same day (page 17, Appendix to certified copy of the record). The judgment is reprinted as Appendix C to this petition, beginning at page 44.

Our petition for rehearing was filed April 16, 1955 (pages 19-26, Appendix to certified copy of the record). Our petition for rehearing is reprinted as Appendix D to this petition, beginning at page 45.

Our petition for rehearing was denied May 2, 1955 (page 31, Appendix to certified copy of the record).

On May 17, 1955, the Court of Appeals entered its order staying its mandate for a period of thirty days pending this petition for writ of certiorari (page 33, Appendix to certified copy of printed record).

On June 17, 1955, the Court of Appeals entered its order further staying the issuance of its mandate to July 1, 1955.

The judgment of the Court of Appeals having become final and this petitioner believing himself to be grievously injured thereby, his only remaining remedy is to petition this Court to issue its writ of certiorari, as provided by law. 28 U. S. C., Sec. 1254 (1).

Questions Presented.

As appears from the opinions filed, the pleadings and our statement of the case which follows, plaintiff-petitioner lost his right foot and leg, and sustained many other severe injuries, as the result of being drawn into the exposed pressure rollers of a hay baling device, a Roto-Baler, manufactured and sold by the defendant-respondent, while attempting to re-engage the baling twine thereon. Plaintiff-petitioner contended that he was then following negligent instructions given him and others in the demonstration of the machine by defendant-respondent.

Plaintiff-petitioner, his employer, and the employer's father all testified in plaintiff's behalf that all three of them were present at a demonstration at which the negligent instructions were given. Defendant-respondent's demonstrator-representative and its dealer testified that plaintiff-petitioner was not present at any such demonstration and that no such instructions were given.

Additionally, plaintiff-petitioner contended that in the exercise of due care the manufacturer ought to have equipped the baler with a shield to safeguard against some of the dangers of the exposed pressure rollers.

Judge Reeves specifically found:

> "8. The plaintiff and others instructed as above stated, and before whom demonstrations were made, relied on such instructions and demonstrations as setting forth a safe and proper method of fixing

and engaging the twine with the hay in the rolls of the operating machinery.

9. The defendant had recognized the dangers inherent in its manufactured product and before the accident and damages to the plaintiff had provided and was in the course of distributing protective devices or shields so as to obviate accidents precisely like that suffered by the plaintiff.

12. Defendant acting by its agents, Drennon and Harlan, in negligently directing plaintiff to follow the method of using his hand to press hay against the limp twine, as he was doing when injured, incurred liability to plaintiff, entirely irrespective of the additional question or issue of guarding the machine" (R. 20-22).

In the course of his memorandum opinion, in resolving the conflicts in the testimony on the demonstration and instructions, Judge Reeves said:

"1. On the factual question, as to whether the plaintiff was in fact instructed as he claims, or as claimed by the defendant, a decision should be made in favor of the plaintiff for the reason that, under the law, a witness who testified to the affirmative of a proposition is ordinarily entitled to be preferred to one who testifies to a negative. *Stitt* v. *Huidekopers,* 84 U. S. 384.

In analyzing the testimony in the case, the defendant's witnesses who participated in the demonstration, while they said that the plaintiff and C. S. Duncan were not present, their testimony amounts to a negative, that is, they did not see them. Both of the plaintiff's witnesses, C. S. Duncan and Donald Duncan, testified positively that the plaintiff and C. S. Duncan were present. Moreover, plaintiff and Donald Duncan reinforced such testimony by saying that Donald Duncan called the plaintiff by 'phone so that he could be present at the demonstration. This was done because the plaintiff was an employee

of Donald Duncan and it was apparently understood that he was to operate the machine. Furthermore, it is the rule that a witness is presumed to speak the truth. 70 C. J., Section 915, p. 760. And it is the duty of the trier of a fact to harmonize evidence by assuming on disputed matters that each witness was attempting to tell the truth and that he was mistaken on any factual question rather than committing perjury. It could not be well found on the face of the positive testimony of three witnesses that the plaintiff was not present at the time the demonstration was made.

As indicated, these three witnesses testified positively that the demonstrator or demonstrators, as agents for the defendant and expressly assigned for that purpose, repeatedly demonstrated that method of engaging the twine which was employed by plaintiff and which resulted so tragically'' (R. 16-17).

In its opinion, which completely ignores the issue of defendant-respondent's liability to plaintiff-petitioner because of its failure to place protective devices or shields on its Roto-Baler, as found and declared by Judge Reeves, the Court of Appeals reversed and remanded, holding that the trial court committed prejudicial error in treating plaintiff-petitioner's evidence of the demonstration and that negligent instructions were given, as positive evidence, and holding and treating defendant-respondent's evidence that there was no such demonstration and that no such instructions were given, as negative evidence.

These circumstances of the case give rise, we respectfully suggest, to the following questions:

1. Did the Court of Appeals correctly interpret and apply the applicable principle of decision announced by this Court in *Stitt* v. *Huidekopers,* 84 U. S. 384?

2. Did the fact that Judge Reeves referred to defendant's testimony on the demonstrations and instructions as

negative evidence under the rule laid down by this Court in *Stitt* v. *Huidekopers,* 84 U. S. 384, constitute prejudicial error calling for reversal and remand?

3. Since defendant-respondent was found liable to plaintiff-petitioner because of its failure to provide the Roto-Baler with protective devices or shields, was reversal with remand properly entered on the sole ground that the trial court erred with respect to the weight to be accorded the evidence on an entirely separate ground of liability?

STATEMENT OF THE CASE.

Jurisdiction of the United States District Court was invoked, in the first instance, on diversity of citizenship, the complaint alleging (R. 1), the answer admitting (R. 8), and the trial court declaring (R. 22), that the plaintiff was a citizen of Iowa, and the defendant, a corporation organized under the laws of the State of Delaware, is a citizen of that state.

The complaint alleged that in April, 1947, defendant sold to plaintiff's then employer, Donald Duncan, a "Roto-Baler," a new product recently manufactured by the defendant for the purpose of baling hay and straw; that in the operation of the machine, hay or straw passed from a large, flat power conveyor into a revolving press roll, where it was then formed into a bale; twine for binding the bale formed was automatically fed; that if there was a break in the continuous movement of hay on the conveyor, the twine would fail to feed under the press roll so that it would be necessary for the operator of the machine to manually push the twine under and into the press roll in order to start the wrapping operation; that the machine was adjusted and its use and operation demonstrated to plaintiff and his employer by the defendant, its agents, servants and employees; that it was particularly dangerous if operated in accordance with the instructions and demonstrations given plaintiff and the others; that it would have been feasible to provide the machine with a safety shield and stop mechanism and that the defendant knew, or should have known, that it was dangerous to deliver said machine without such protective devices, or others, to protect persons using the machine from being caught in the revolving press roll;

that prior to the demonstration and instructions given the plaintiff by the defendant, it had designed and manufactured a safety shield to be installed on its Roto-Balers; that defendant knew plaintiff's employer had purchased a Roto-Baler and that plaintiff was operating the machine without a safety shield to protect him, but defendant did not notify or warn plaintiff or his employer of the dangers present.

It is further alleged that plaintiff was instructed in the demonstration in the event there was a break in the continuous movement of hay on the power conveyor, to push a quantity of hay against the revolving press roll while it was in motion for the purpose of engaging the binding twine in the press roll; that about July 28, 1947, while plaintiff was yet under twenty-one years of age, and while he was operating the Roto-Baler in accordance with the instructions given him, a break occurred in the continuous movement of hay on the power conveyor, and that plaintiff picked up a quantity of hay in his hand and pushed the same toward and against the revolving press roll, when his hand was suddenly and violently caught in it and plaintiff was in imminent danger of his hand, arm and body being crushed, and in his dire extremity and during his body contortions and efforts to extricate himself, his foot and leg were caught in the revolving press roll, were crushed, and had to be amputated, and it is charged the plaintiff sustained many other injuries (R. 1-7).

The answer consisted, in the main, of a plea of general denial and contributory negligence (R. 8-10).

The evidence showed that on May 7, 1947, defendant shipped its Roto-Baler in question from LaPorte, Indiana, to Lee Harlan, its dealer at Clarinda, Iowa, and he sold it to Donald Duncan, plaintiff's employer, on May 28,

1947. This was the first baler of this type sold by Mr. Harlan (R. 87-95). The baler was delivered to Mr. Duncan late in May or early in June (R. 107). Sometime in the first week of June of 1947, the operation of the machine was demonstrated on the farm of Mr. Donald Duncan's father, Mr. Charles C. Duncan, near Clarinda by Mr. Lee Harlan and Mr. Verne Drennan, defendant's "block-man" or manufacturing representative in the particular territory (R. 104-187, 190, 203, 204).

Plaintiff, Donald Duncan, and Charles C. Duncan all testified that plaintiff and Charles C. Duncan were present at the demonstration (R. 44, 45, 190) and that at said demonstration Harlan and Drennan demonstrated the proper method of correction when the twine did not engage in the rollers automatically as being to stand on the tongue of the baler and take a handful of hay and press it against the twine so as to force the twine into the revolving rollers; instructed them that was the way to do it and that such way was safe (R. 45, 53, 65, 71).

Harlan and Drennan both testified Donald Duncan was the only one present at the demonstration other than themselves, and that neither plaintiff nor Charles C. Duncan was there (R. 190, 192, 197, 205, 207); they demonstrated the proper method to be to take a handful of hay, stand back and pitch it against the twine so as to carry the twine into the rollers, or to stop the rollers and manually insert the twine between the stationary rollers (R. 191, 193, 206, 207); they at no time poked hay into the revolving rollers and neither did anyone else (R. 194, 224).

Plaintiff testified that he thought taking a handful of hay and manually pushing the string into the revolving rollers was the only way to correct the wrapping operation (R. 53, 47); he did not know of the method of throw-

ing the hay against the twine, although he did know he could stop the rollers and correct the wrapping operation (R. 70, 47, 54). That in operating the baler up to the time of the accident he relied upon what the demonstrators had told him and always followed the method of taking a handful of hay and pushing the twine into the revolving rollers (R. 46, 53).

Plaintiff had operated this baler for about three days prior to the time of the accident, and was then on his fourth day (R. 46, 67). On the day of the accident, July 28, 1947, he was baling clover and straw just south of the Iowa line in Missouri on the farm of Mr. Homer Woods (R. 69, 238, 59, 4, 78, 55, 107, 104). The windrows were normal in size, about three and one-half feet wide and from 10 inches to 18 inches high (R. 69). On the day of the accident he had baled all morning and for something like two and a half hours after dinner (R. 69).

Just prior to the accident a bale formed and he saw the twine tube drop down and he stopped the forward motion of the baler and looked back (R. 69). He did not see the twine engaged between the rollers (R. 69). He could have turned the power off and put it into neutral by the lever under the seat but he did not do that (R. 70.) He cut down the speed of the motor to about idling speed (R. 70). He did not know how fast the rollers were running or at what speed there would be danger (R. 70, 47). He got off the left side of the tractor going forward (R. 70). He walked between the conveyor and the tongue and stepped up on the tongue (R. 71, 47, 48). He stood with both feet on the tongue, bent forward at the waist over the rollers, his right hand toward the foot of the conveyor and his left hand in the direction of the rollers (R. 71, 72). He had picked up a handful of hay which he held in his right hand; he brought his right hand in front

of his body and leaned over in a twist pretty far off balance and held the hay against the twine and within 6 to 10 inches of the rollers (R. 74, 48, 54, 73).

Plaintiff testified that when he put the hay up to the rollers it would not fall apart, as it had done on previous occasions, but seemed to jerk his hand right into the rollers, and in doing so, he was sort of off balance and somehow he flipped or did an acrobatic twist and landed on his back; his hand was going in and he threw his foot up to pull his hand out and in it went (R. 54, 75, 76). His right hand went in a distance of about 5 or 6 inches with the back of his hand up and his palm down; his right leg went in just about up to the knee (R. 54, 75). He did not slip or fall or stumble as he was putting the hay in there (R. 75). The twine is about two or three inches from the end of the rollers and that is about the place his hand went into the rollers (R. 75). When his foot went into the rollers it released his hand (R. 75).

Besides denying that plaintiff was present at the demonstration, or that the claimed instructions were given him, defendant's evidence showed that during the experimental years 1941 to 1947, no one was hurt by getting into the rollers and it never occurred to the defendant's engineer in charge that there was any danger or that a guard or shield was needed (R. 167, 134). In the spring prior to this accident, some 3,000 machines were sold and put into the field (R. 168, 137). Not one of these balers was equipped with a safety shield (R. 138). Defendant learned that some persons had been hurt by walking up the conveyor into the rollers (R. 169, 171, 146). Defendant knew of no one getting hurt in any other way (R. 170, 171, 146, 147, 169). Defendant's chief engineer then on July 14, 1947, ordered Mr. Harrer to design a shield to prevent people walking up the conveyor

and getting into the rollers (R. 147, 146, 175). The drawings were completed for that project July 17, 1947; they were released for manufacture on July 21, 1947; the first U-bars shields were manufactured on July 25, 1947, shipped on that date and received at defendant's Omaha Division on or after July 28, 1947, the date of this accident. Defendant objected to the evidence as to shields being put on the balers after this accident (R. 49, 50, 51) but such objection was overruled (R. 147, 175, 176, 94). After the U-bars shield was designed to prevent persons walking up the conveyor into the rollers, defendant decided to put the side shields on also to prevent persons standing on the ground, reaching over and getting their hands enmeshed in the rollers (R. 169, 147, 171, 172). Defendant sent shields out for each of the balers sold prior to July, 1947, and installed them free to the owners (R. 175, 178). Since that time such shields are standard equipment for all balers sold (R. 178).

The record shows that gangrene set in after plaintiff was removed to the hospital, and that he was in great pain and anxiety, that it finally became necessary to amputate his leg about three inches below the knee, and he had many other disabling injuries (R. 54, 55; 55-57; 58; 117; 119-120).

After hearing all of the testimony, the trial court, in addition to filing its memorandum opinion (R. 14-20), made the following findings of fact and declarations of law:

> "I make the following FINDINGS OF FACT:
>
> 1. The plaintiff suffered the injuries as claimed by him, on July 28, 1947, while operating the Roto-Baler manufactured and supplied by the defendant.
>
> 2. The plaintiff, in attempting to bring about an engagement of the twine with the hay in the rollers

of the Roto-Baler followed the instructions of an agent or agents for the defendant.

3. The hazards of the machinery in the Roto-Baler were known to the defendant and it recognized its duty to provide shields or protective devices before the accident occurred but had failed to attach such a device or protective shield to the Roto-Baler used by the plaintiff.

4. In feeding or pressing hay into the roller of the Roto-Baler, to force an engagement of the wrapping twine, plaintiff followed the instructions of the defendant's agents, and, when his right hand was caught in the roller, in his effort to extricate his hand, his right foot was caught in the roller, and by reason thereof he suffered the injuries complained about in his petition and evidence.

5. At the time, an improper and unsafe use of the Roto-Baler mentioned in the pleading and the evidence was demonstrated by the agents of the defendant specially assigned for that purpose. The method of pressing hay or straw against a limp twine and the moving of the rollers was demonstrated by said agents, and the plaintiff and purchaser and others were instructed to employ that method.

6. The plaintiff and C. S. Duncan were present with others at the time such demonstrations were made and such instructions given.

7. The book of instructions in a receptacle of the machine was not called to the attention of plaintiff and the purchaser at the time the demonstrations were made.

8. The plaintiff and others instructed as above stated, and before whom demonstrations were made, relied on such instructions and demonstrations as setting forth a safe and proper method of fixing and engaging the twine with the hay in the rolls of the operating machinery.

9. The defendant had recognized the dangers inherent in its manufactured product and before the accident and damages to the plaintiff had provided

and was in the course of distributing protective devices or shields so as to obviate accidents precisely like that suffered by the plaintiff.

10. Plaintiff was not guilty of contributory negligence. In following the method and course expressly directed by defendant through Drennon and Harlan, its agents, plaintiff was not negligent.

12. Defendant, acting by its agent, Drennon and Harlan, in negligently directing plaintiff to follow the method of using his hand to press hay against the limp twine, as he was doing when injured, incurred liability to plaintiff, entirely irrespective of the additional question or issue of guarding the machine.

13. It was conceded by the parties in the trial that plaintiff received his injuries in the State of Missouri.

14. Plaintiff received painful injuries to his back and has lasting impairment therein of approximately 25 per cent.

I state the following DECLARATIONS OF LAW:

1. There was a diversity of citizenship between the parties, and this court has jurisdiction.

2. The negligence of the defendant caused the accident and damages to the plaintiff and he is entitled to recover.

3. Reasonable compensation for the damages sustained by the plaintiff would be $50,000.00."

ARGUMENT.

One of the grounds upon which plaintiff had recovery against defendant was that negligent instructions were given to plaintiff at a demonstration conducted by defendant. A sharp conflict existed in the testimony as to whether or not plaintiff was present at such demonstration, and as to whether or not any negligent instructions were given. The case being tried to the court, it became the duty of Judge Reeves to reconcile the conflicts in the testimony of plaintiff's witnesses and defendant's witnesses.

Almost a century ago, this Court had before it *Stitt* v. *Huidekopers*, 84 U. S. 384. There was a sharp conflict in the testimony of the witnesses in that case. The trial judge charged the jury, in part, as follows:

> "You should reconcile the testimony, if possible, without imputing falsehood to either affiant. It is a rule of presumptions that ordinarily a witness who testifies to an affirmative is to be preferred to one who testifies to a negative. Why? It is because he who testifies to a negative may have forgotten. It is possible to forget a thing that did happen. It is not possible to remember a thing that never existed (l. c. 890)."

This Court approved the charge and so ruled that where the trier of the fact reconciles conflicts by choosing to believe that witnesses have forgotten what actually transpired rather than by finding that witnesses have testified falsely, the *negative* of the fact sought to be established may be referred to as *negative* testimony.

Even the most cursory reading of Judge Reeves' memorandum opinion brings home the fact that Judge Reeves

so understood the philosophy of decision in the reconciliation of conflicts in testimony as so announced by this Court.

Five witnesses testified in person on the issues of demonstrations and instructions before Judge Reeves. He not only heard their testimony, but he had the benefit of seeing them and watching them as they testified. In numbers, if the number of witnesses alone is to be considered, the testimony preponderated in plaintiff's favor because he offered himself and two other witnesses; the defendant had only two witnesses on these issues. If the credibility of witnesses were to be determined on their interest, the balance would again be in plaintiff's favor since the Duncans, father and son, his witnesses, were without any interest in this litigation. Defendant's two witnesses had participated in many demonstrations, the plaintiff and his witnesses in only one. Who would be most likely to forget?

Judge Reeves made our requested finds of fact Nos. 5, 8 and 12 (R. 12-13, R. 21-22). If Judge Reeves had filed no memorandum opinion, if he had made only these findings of fact, without explaining why or how he made them on the conflicts in the testimony, plaintiff's judgment thereon would not have been reversed, since the only ground for reversal is the error which the Court of Appeals said existed because Judge Reeves, in his memorandum opinion, explained his resolution of the conflicts.

The Court of Appeals held that by his reference to the *Stitt* case, Judge Reeves showed that he was mistaken concerning the particular weight to be given defendant's evidence that plaintiff was not present at any demonstration and that no negligent instructions were given him. We respectfully urge that when the *Stitt* case is analyzed, it will be found to announce only that same philosophy

governing the resolution of conflicts which Judge Reeves employed in the case at bar, a willingness to believe and to find that the defendant's witnesses had forgotten about those matters rather than to find and believe that they had testified falsely concerning them.

We respectfully urge that it is a matter of great concern to all of our courts that no judge, no trier of the fact, should be so circumscribed and limited in his reasoning and expressions of opinion as to leave him voiceless and silent in such situations. We respectfully urge that your petitioner was grievously injured because the Court of Appeals inadvertently failed to appreciate the ruling of this Court in *Stitt,* or else failed to properly apply that rule.

Judge Reeves' findings in favor of plaintiff were supported by the overwhelming weight of the evidence, but Judge Reeves, of course, had his choice of two permissible views of the evidence dealing with the demonstrations and instructions. The fact that he found for the plaintiff does not make such choice and his findings thereon clearly erroneous. We respectfully urge that the Court of Appeals was in error in holding otherwise. *United States* v. *Yellow Cab Co.,* 338 U. S. 338, 70 S. Ct. 177, 179.

Petitioner's judgment rested on the additional grounds that operation of the Roto-Baler was hazardous because defendant had not provided it with shields or other protective devices; that it had recognized the dangers inherent to its manufactured product before plaintiff's injuries and had provided and was in the course of distributing protective devices or shields so as to obviate accidents precisely as that suffered by the plaintiff. The weight of the evidence supporting plaintiff's judgment on these grounds was not an issue. It did not depend on

whether or not a demonstration was attended by the plaintiff or whether or not he was given negligent instructions. Defendant's liability to plaintiff on this ground was and is clear. *Willey* v. *Fyrogas Co.*, 363 Mo. 406, 251 S. W. 2d 635, 640; *Winkler* v. *Macon Gas Co.*, 361 Mo. 1017, 238 S. W. 2d 386; *Lynch* v. *International Harvester Co.*, 60 F. 2d 223; *Karsteadt* v. *Phillip Gross Hdw. & Supply Co.*, 179 Wis. 110, 190 N. W. 844.

So, even were we to concede that the Court of Appeals was correct in ruling that Judge Reeves had erred about the burden of proof with respect to the issues of demonstrations and negligent instructions, yet, since plaintiff's judgment on these additional grounds was unaffected by any such error, the Court of Appeals erroneously set aside plaintiff's judgment. Any error with respect to the weight of the evidence concerning demonstration and instructions did not affect the substantial rights of the parties with respect to this additional ground of recovery. It was but harmless error at most, for which reversal should not have been ordered. U. S. C., Section 2111.

Petitioner most respectfully submits that the Court of Appeals has misconstrued and misapplied the ruling of this Court in the *Stitt* case. Additionally, we believe the record shows that petitioner's judgment has been reversed for error which, if error at all, is but harmless error.

Prayer.

Because of the error shown, and the important general questions present, your petitioner respectfully prays that this Honorable Court issue its writ of certiorari to the United States Court of Appeals for the Eighth Circuit for consideration of its proceedings and judgment herein.

Respectfully submitted,

SAM B. SEBREE,
1516 Federal Reserve Bank Bldg.,
Kansas City, Missouri,
Counsel for Petitioner.

SEBREE, SHOOK, HARDY & OTTMAN,
1516 Federal Reserve Bank Building,
POPHAM, THOMPSON, POPHAM, MANDELL & TRUSTY,
1111 Scarritt Building,
Kansas City 6, Missouri,
Of Counsel.

Appendix A.

(Memorandum Opinion on Merits of Case.)

This case was heretofore tried to the court without the intervention of a jury, the same having been waived. At the conclusion of the trial the cause was submitted on the evidence, arguments of counsel, and briefs.

It is charged by the plaintiff that he suffered injuries by reason of the negligence of the defendant in the following particulars: In April or May of 1947 the plaintiff was employed by a farmer named Donald Duncan. He said Duncan was operating a farm or farms near the town or city of Clarinda, Iowa. At that time plaintiff's employer purchased a farm machine designated as a Roto-baler. The Roto-baler was designed to pick up straw or hay from the windrows in the field, and then, by rolling such straw or hay into bundles or bales, it automatically wrapped same with twine. It was geared to, or connected up with, power equipment, so that it was mobile. And its design or construction was such as to be operated by one man. It had exposed rotating machinery. In its operation there was the constant threat of, or hazard of injury unless the utmost care was exercised.

In his petition the plaintiff says in substance that it was innately, but not obviously, dangerous, and some of its machinery should have had, and could have had protective devices or shields so as to avoid the probability of injury in its use, but notwithstanding such hazards, known to the defendant, such devices or protective shields had not been provided at that time. And it is further charged that the defendant, through its proper agent or agents, gave instructions or made demonstrations as to a safe manner in which such machinery should be operated.

To make effective the twine binding mechanism of the machine, it became necessary, on occasion in its operation, to put pressure upon the dangling, limp, and suspended twine used for binding purposes so that such twine would engage with the pressure rollers and thus effectively bind the bales. For that purpose, the defendant, through its proper agent, instructed the purchaser and plaintiff and demonstrated that such engagement could be consummated by pressing a quantity of hay or straw against the revolving rolls which they were in motion.

It is then alleged by the plaintiff that, obedient to such instructions and while thus pressing a quantity of hay against the limp twine and the pressure rolls, his right hand was caught and mangled. And that, in his efforts to extricate his hand, his right foot was drawn into the press rolls and was so mangled, together with a portion of his leg just below the knee, that amputation became necessary, and that he has suffered, not only from his disabilities, but from pain, since the accident.

The defendant by its answer denies the necessity or feasibility to protect any part of the machinery, and, moreover, it says that the danger was open and obvious to the plaintiff and that he recklessly placed himself in a position of peril and danger, and that the injuries suffered by him were occasioned by his own or contributory negligence.

Upon the pleadings thus made up each of the parties adduced testimony in support of his or its respective contentions. There is no controversy but that the plaintiff suffered the injuries claimed by him.

On behalf of the plaintiff, he testified that he was present at the time the instructions were given and the demonstration made by an agent of the defendant assigned by defendant for that purpose, and that, in following such

instructions, his right hand, when placed with a quantity of hay within 6 to 8, 8 to 10 inches, of the revolving rolls, was drawn into the rollers and that in his effort to extricate his hand, his right foot was drawn in, with the effect described or stated. No one was present at the time the plaintiff suffered his injuries. Upon his cry for help, witnesses, who were hard by, rescued him by dismantling the machinery. Donald Duncan, who had purchased the machine, testified that two agents of the defendant, that is, the dealer and a factory or blockman came to his farm and there demonstrated the manner in which the twine could be made to engage with the rollers. This testimony was supported by C. S. Duncan, the father of Donald Duncan, and the plaintiff.

The two agents of the defendant, that is to say, the dealer or distributor and the factory or blockman, whose duty it was to instruct the purchasers and users of the machine how to operate it without peril or danger, both said that the instructions and demonstrations were such that, in case the twine failed to engage with the hay in the rollers, a bunch of hay should be thrown at the twine and the rollers, and that it should not be presssed against them by hand. Moreover, both of these witnesses said that C. S. Duncan and the plaintiff were not present when the instructions were given and the demonstrations made. A book of instructions had been placed in a receptacle of the machine and such instructions forbade the method employed by the plaintiff, such as he claims he was instructed to use.

The plaintiff was badly hurt, spent a considerable time in the hospital, but presently is able to do some farm work. He can even use, to some extent, his damaged right hand and is able to operate machinery, although he wears an artificial right limb. According to physicians the use of his right hand has a limitation of about 35%.

1. On the factual question, as to whether the plaintiff was in fact instructed as he claims, or as claimed by the defendant, a decision should be made in favor of the plaintiff for the reason that, under the law, a witness who testified to the affirmative of a proposition is ordinarily entitled to be preferred to one who testifies to a negative. *Stitt* v. *Huidekopers,* 84 U. S. 384.

In analyzing the testimony in the case, the defendant's witness who participated in the demonstration, while they said that the plaintiff and C. S. Duncan were not present, their testimony amounts to a negative, that is, they did not see them. Both of the plaintiff's witnesses, C. S. Duncan, and Donald Duncan, testified positively that the plaintiff and C. S. Duncan were present. Moreover, plaintiff and Donald Duncan reinforced such testimony by saying that Donald Duncan called the plaintiff by 'phone so that he could be present at the demonstration. This was done because the plaintiff was an employee of Donald Duncan and it was apparently understood that he was to operate the machine. Furthermore, it is the rule that a witness is presumed to speak the truth. 70 C. J., Section 915, p. 760. And it is the duty of the trier of a fact to harmonize evidence by assuming on disputed matters that each witness was attempting to tell the truth and that he was mistaken on any factual question rather than committing perjury. It could not be well found on the face of the positive testimony of three witnesses that the plaintiff was not present at the time the demonstration was made.

As indicated, these three witnesses testified positively that the demonstrator or demonstrators, as agents for the defendant and expressly assigned for that purpose, repeatedly demonstrated that method of engaging the twine which was employed by plaintiff and which resulted so tragically.

It should have been stated that the plaintiff suffered his injury on July 28, 1947.

2. The defendant earnestly objected to testimony that shields or protective devices were placed on this particular type of farm machinery after the accident occurred. The evidence was that the defendant recognized the hazards of the machinery, and before the accident to plaintiff had prepared and was in the course of distributing protective devices or shields so as to circumvent an accident like that suffered by the plaintiff. "A person undertaking to furnish machinery or appliances for the use of others ordinarily assumes a duty to furnish proper and safe appliances, * * *." 65 C. J. S., Section 70, p. 562.

3. On the question of a manufacturer's liability in such case, it was said by the Supreme Court of Missouri in *Willey* v. *Pyrogas Co. et al.*, 251 S. W. 2d 635, l. c. 640, in quoting from a Restatement of the Law of Torts (Section 395) following the well known case of *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, as follows:

> "'A Manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm to those who lawfully use it for a purpose for which it is manufactured * * * is subject to liability for bodily harm caused to them by its lawful use in a manner and for a purpose for which it is manufactured.'"

This principle was also announced in *Winkler* v *Macon Gas Co.*, 238 S. W. 2d 386. The Supreme Court of Missouri there cited a Restatement of the Law of Torts, l. c. 391, and said, among other things, that it was negligence on the part of the vendor or manufacturer if it "'(c) fails to exercise reasonable care to inform them of its

dangerous condition or of facts which make it likely to be so.'"

A similar view was expressed in *Lynch* v. *International Harvester Co.*, 60 F. 2d 223, l. c. 224, Tenth Circuit, as follows:

> "• • • one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities is liable to any person who suffers an injury therefrom which might have been reasonably anticipated, whether there were any contractual relations between the parties or not."

A somewhat similar case was before the Supreme Court of Wisconsin. The case is *Karsteadt* v. *Phillip Gross Hdw. & Supply Co.*, 179 Wis. 110, 190 N. W. 844. Recovery was had in that case because of a faulty or erroneous demonstration, as in this case.

Many other cases from other jurisdictions were analogous to those hereinabove discussed.

It should have been stated that the accident occurred in Missouri, and that the law of the place of the accident is the law of the forum.

4. The only other question for consideration was what award should be allowed to the plaintiff. This is most difficult by reason of the varying views of the courts and the diversified results of jury trials.

In the case of *Southern Pacific Co.* v. *Guthrie*, 180 F. 2d 295, the Court of Appeals for the Ninth Circuit discussed at length a verdict in the sum of $100,000 for the loss of a limb, in a similar case. The complainant in that case had lost a leg by reason of the claimed negligence of the defendant. The leg had been amputated above the

knee. The plaintiff in that case was 59 years of age. The court said:

> "It is common knowledge that for a man of Guthrie's age, aches and pains arising out of physical disabilities do not ordinarily lessen, as they might for a younger man."

And then, concerning the verdict, the court said:

> "* * * it is the opinion of the members of this court that the amount of the verdict is too high. What we, as an appellate court, are permitted to do about such a situation, is another matter."

The conclusion reached by the reviewing court was that it was without authority to disturb the verdict, and the author of the opinion believed that the case should be reversed with a direction that a remittitur be ordered. And then the court significantly said:

> "Neither the industry of counsel nor our own research has been able to turn up any case of any appellate court *where a verdict anywhere near so high as that rendered here has been upheld as compensation for comparable injuries*" (Emphasis mine).

In *Dickson* v. *Beemer*, 217 S. W. 2d 515, Syll. 5, the Supreme Court of Missouri upheld "Judgment for $5000 for loss of leg in middle third of thigh for a man of 60 years of age as a result of being struck by automobile and who was earning $6 per day before accident was not grossly inadequate where there was nothing in the record to show passion or prejudice on part of jury." The language of the court, l. c. 518, was:

> "A verdict will not be set aside unless there is something substantial to show prejudice or passion on the party of the jury, *or that it is grossly excessive or grossly inadequate*" (Emphasis mine).

In *Jones* v. *Thompson*, 184 S. W. 2d 407, the Supreme Court of Missouri required a remittitur of $6,000 where the plaintiff had suffered a 90% loss of the use of his left hand. The verdict was $18,521; the amount approved was $12,521.

Other cases have been examined, but little help has been obtained in an effort to reconcile differences and to arrive at a fair award in this case. The plaintiff has been subjected to several operations and continues to suffer pain as well as the disabilities arising from his injuries. His doctor bills and hospital bills were paid by his parents and amount to approximately $2,000. His attorneys, very properly, must be paid out of any award that is made to him. And it is a matter of common knowledge that the dollar is not worth as much now as a few years ago. Plaintiff's injuries were not as great as those mentioned in the Southern Pacific Co. case.

An allowance of $50,000 would appear to be reasonable.

Kansas City, Missouri, January 18, 1954.

s/ Albert L. Reeves,

United States District Judge.

On January 19, 1954, the court filed its findings of fact and conclusions of law, which, omitting caption and signature, are in words and figures as follows:

I make the following FINDINGS OF FACT:

1. The plaintiff suffered the injuries as claimed by him, on July 28, 1947, while operating the Roto-baler manufactured and supplied by the defendant.

2. The plaintiff, in attempting to bring about an engagement of the twine with the hay in the rollers of the Roto-baler followed the instructions of an agent or agents for the defendant.

3. The hazards of the machinery in the Roto-baler were known to the defendant and it recognized its duty to provide shields or protective devices before the accident occurred but had failed to attach such a device or protective shield to the Roto-baler used by the plaintiff.

4. In feeding or pressing hay into the roller of the Roto-baler, to force an engagement of the wrapping twine, plaintiff followed the instructions of the defendant's agents, and, when his right hand was caught in the roller, in his effort to extricate his hand, his right foot was caught in the roller, and by reason thereof he suffered the injuries complained about in his petition and evidence.

5. At the time, a proper and safe use of the Roto-baler mentioned in the pleading and the evidence was demonstrated by the agents of the defendant specially assigned for that purpose. The method of pressing hay or straw against a limp twine and the moving of the rollers was demonstrated by said agents, and the plaintiff and purchaser and others were instructed to employ that method.

6. The plaintiff and C. S. Duncan were present with others at the time such demonstrations were made and such instructions given.

7. The book of instructions in a receptable of the machine was not called to the attention of plaintiff and the purchaser at the time the demonstrations were made.

8. The plaintiff and others instructed as above stated, and before whom demonstrations were made, relied on such instructions and demonstrations as setting forth a safe and proper method of fixing and engaging the twine with the hay in the rolls of the operating machinery.

9. The defendant had recognized the dangers inherent in its manufactured product and before the accident and damages to the plaintiff had provided and was in the

course of distributing protective devices or shields so as to obviate accidents precisely like that suffered by the plaintiff.

10. Plaintiff was not guilty of contributory negligence. In following the method and course expressly directed by defendant through Drennon and Harlan, its agents, plaintiff was not negligent.

11. On the plea of settlement, the draft of $1,999.99 was from Donald Duncan, insurer, to the parents, covering accrued expenses for which the parents were responsible: The $300.00 draft was for additional, later similar expenses chargeable to the parents, and the $1.00 from the same source was the consideration for the covenant not to sue the employer. This covenant is in the record and expressly reserves all rights of plaintiff against this defendant. $1.00 is regarded as trivial but when satisfying the judgment herein, defendant may take credit for said sum of $1.00.

12. Defendant acting by its agent, Drennon and Harlan, in negligently directing plaintiff to follow the method of using his hand to press hay against the limp twine, as he was doing when injured, incurred liability to plaintiff, entirely irrespective of the additional question or issue of guarding the machine.

13. It was conceded by the parties in the trial that plaintiff received his injuries in the State of Missouri.

14. Plaintiff received painful injuries to his back and has lasting impairment therein of approximately 25%.

I state the following DECLARATIONS OF LAW:

1. There was a diversity of citizenship between the parties, and this Court has jurisdiction.

2. The negligence of the defendant caused the accident and damages to the plaintiff and he is entitled to recover.

3. Reasonable compensation for the damages sustained by the plaintiff would be $50,000.00.

Kansas City, Missouri, January 18, 1954.

On January 19, 1954, the Court entered the following judgment (Caption omitted):

(Judgment.)

This cause having heretofore been tried to the court without the intervention of a jury, same having been waived; and the plaintiff being represented by Messrs. Stephens, Thornell and Millrone of Clarinda, Iowa, Messrs. Sebree, Shook, Hardy & Ottman, and Messrs. Popham, Thompson, Popham, Mandell and Trusty, of Kansas City, Missouri; and the defendant being represented by Messrs. Kuraner, Freeman & Kuraner, of Kansas City, Missouri;

And the parties having announced ready for trial, evidence was adduced on behalf of the plaintiff and on behalf of the defendant. And said cause having been argued by counsel and taken under advisement on the submission of briefs of the law and facts,

And, Now, on this 18th day of January, 1954, said cause having been again taken up for consideration and the evidence having been examined and considered and the briefs and written arguments of counsel having been examined and considered, and the matters and things having been seen and fully understood, and it appearing from a preponderance of the testimony that plaintiff is entitled to recover and that he was damaged by reason of the negligence of the defendant in the sum of $50,000.00.

It Is Therefore Ordered and Adjudged that the plaintiff have and recover of and from the defendant the sum of $50,000.00 and his costs in this behalf laid out and expended.

Kansas City, Missouri.

s/ Albert L. Reeves,

United States District Judge.

Appendix B.

Before Sanborn, Woodrough and Johnsen, Circuit Judges.

Johnsen, Circuit Judge.

A farm employee was injured in Missouri, by having his hand and leg drawn into the compressing rollers of his employer's hay-baling machine, which he was operating. He said that he had been told and shown by the manufacturer's demonstrator-representative that, whenever the baling twine failed to engage with the rotating rollers as a result of having become broken or of there having been an insufficient flow of hay up the conveyor, he should stand on the frame of the machine near the top of the conveyor, at a distance of 6 to 10 inches away from the pressure rollers, and the twine into contact with the rollers by means of some hay held in his hand. He claimed that he had thereafter so done a number of times in his use of the machine, but that on the occasion of the accident the hay had carried his hand into the rollers, causing his body to be jerked onto the conveyor and drawing his leg into the rollers.

He sued the manufacturer of the machine for damages in negligence, on the grounds that its demonstrator-rep-

resentative had given him improper directions and assurances as to the manner in which he should and might safely cause the baling twine to become engaged with the rotating rollers, and further that the manufacturer ought in the exercise of due care to have equipped the baler with a shield to safeguard against some of the dangers of the exposed pressure rollers.

The defendant, in addition to claiming that it was utterly impossible for the accident to have occurred as plaintiff alleged, denied negligence on its part and also set up contributory negligence on the part of the plaintiff as an affirmative defense. The substance of its contention, both as to the lack of negligence on its part and as to the existence of contributory negligence on the part of plaintiff, was that the danger from any proximity to or contact with the moving pressure rollers was so obvious as to be readily and generally appreciable and not to require any shield to safeguard against the possibility of someone being misled as to its nature, and further that the danger also was so glaring that plaintiff was not warranted in relying upon the instructions claimed to have been given him as constituting a safe or proper method to cause the twine to become reengaged with the rollers.

The court, on a trial without a jury, declared, 117 F. Supp. 857, that defendant had been guilty of negligence in both of the respects charged by plaintiff; that plaintiff had not been guilty of contributory negligence, since he had followed the instructions given him by defendant's demonstrator-representative and reasonably was entitled to do so in the circumstances and relationships involved; that defendant's negligence had been the proximate cause of the accident; and that plaintiff had sustained injuries and damages as a result of the accident in the amount of $50,000. The defendant has appealed.

1. Defendant asks us to declare, among other things, as a matter of law, that there was no negligence on its part in the situation, and that plaintiff in any event was guilty of contributory negligence. We cannot say, however, that the trial court was in error in viewing the questions, whether defendant's demonstrator-representative was guilty of a lack of due care in giving the directions and assurances which plaintiff claimed had been done, and whether plaintiff was contributorily negligent in following those instructions on the basis of the demonstrator's superior knowledge and purported experience and of plaintiff's own unfamiliarity with the machine, as constituting on the circumstances involved, under Missouri law, issues of fact and not of law.

There is, of course, no Missouri case that is identical on the facts. But the Missouri decisions seem to us to indicate generally that where one relies and acts upon the directions and assurances given him by another as to the proper manner of performing a task or operation, in relation to which the latter legally can be said to owe him some duty as to his safety, it ordinarily is a question for the jury to resolve whether the directions and assurances given were improper and such as to amount to negligence in the particular circumstances, and also whether the reliance upon and following out of them in the situation involved constituted contributory negligence. See e.g. *Whittington* v. *Westport Hotel Operating Co.*, 326 Mo. 1117, 33 S. W. 2d 963, 968-969; *Spurlock* v. *Union Finance Co.*, 363 Mo. 62, 248 S. W. 2d 578; *Martin* v. *Maxwell-Brisco Motor Vehicle Co.*, 158 Mo. App. 188, 138 S. W. 65.

An exceptional situation may, of course, at times be presented, in which the directions and assurances given are so obviously and glaringly dangerous that there cannot be said to be any room for a reasonable difference of opinion

to exist on whether a normally prudent person would have refused to rely upon and follow them, as a matter of being willing, in the interest of his own safety, to accept the consequences, from his failure to do so, of any other consideration that might be involved in his tasks and relationships. We do not believe, however, that the present situation is required on its circumstances to be viewed as one of that extreme and inexorable nature. And this conclusion is fortified by the trial judge's considered appraisal that the evidence presented a submissible case under the standards of Missouri law. We have previously held that the question whether an issue is for the court or the jury in a diversity case is within the rule that on doubtful questions of state law we will accept the trial judge's considered appraisal of the local law of his jurisdiction, unless we are clearly convinced that he is in error. *Nolley* v. *Chicago M., St. P. & P. R. Co.,* 8 Cir., 183 F. 2d 566, 572.

Defendant cites and relies upon *Yaun* v. *Allis-Chalmers Mfg. Co.,* 253 Wis. 558, 34 N. W. 2d 853, where an identical hay-baling machine was involved but a different method of causing the twine to become engaged with the rollers had been used by the plaintiff than that employed in the present case. The court there, in reversing a judgment for the plaintiff, said that "the hay baler when used as intended was not a thing of danger"; that the manner in which the plaintiff had sought to cause the twine to become engaged with the rollers constituted "a mistake in the method of use of the machine"; and that, in relation to the method which the plaintiff had so used, "The danger of the rollers was apparent in the present case." 34 N. W. 2d at pages 858 and 859.

But a method of use found to have been expressly directed by defendant's demonstrator-representative, who

was present for that express purpose, and constituting, according to plaintiff's testimony, the only one shown him and of which he had any opportunity for knowledge, could hardly legally be declared in the present situation to have constituted a mistaken and unintended one as against the manufacturer. And what significance would perhaps have been accorded in the Yaun case to any directions and assurances on the part of the manufacturer's demonstrator-representative, if they had existed, as to the method there used, such as the court found was the situation in the present case, would seem to have rather clear indication in another Wisconsin case, *Karsteadt v. Phillip Gross Hardware & Supply Co.*, 179 Wis. 110, 190 N. W. 844, where liability for negligence was upheld on the basis of a demonstration of the use of a purchased machine.

We conclude that the trial court cannot be said to have erred in holding that a question of negligence was properly presented by the evidence for the trier of the facts to determine, on (1) whether the defendant's demonstrator-representative was guilty of a lack of due care, if he gave plaintiff such directions and assurances as plaintiff claimed had been done, and (2) whether the defendant, in relation to such instructions as might be found to have been so given and could be expected to be relied on, ought reasonably to have equipped the rollers with some shield or guard, which would be capable of protecting a person, standing on the frame of the machine and attempting to push the baling twine into contact with the rotating rollers by means of some hay held in his hand, against the danger, at least in part, of having his body drawn into the pressure rollers, from his hand becoming caught and jerking him onto the conveyor. Our conclusion, as has been previously indicated, also is the same upon the submissibility of the question of contributory negligence.

2. Defendant, however, has further asked us to declare as a matter of law that it was physically impossible for the accident to have occurred as plaintiff claimed, in that, if he was jerked onto the conveyor from having his hand caught in the rollers, he would have lit upon the conveyor with his feet away from, instead of toward, the rollers, and that he therefore should be denied a recovery as a matter of having failed to establish proximate cause. But we do not deem it necessary to proper judicial functioning generally for a court to have to undertake as a matter of law to translate the involuntary contortions, gyrations and acrobatics of the human body in an accident situation —particularly when some part thereof has been suddenly caught in a machine—into equations of the science of physics in order to resolve the question of proximate cause.

In the first place, one who assumes to describe what occurred to him as he was undergoing momentary accident and injury can hardly be expected to be rendering a clinical study and account of his movements and reactions. What he thus testifies to will accordingly generally impress the listening mind, unless it believes him to be engaged in deliberate falsehood, as being inherently subject to the possibility of inaccurate impressions, unrecognized variables or affecting imponderables in what actually did occur. And before any judicial attempt is made to equate such a lay description into scientific constants, it should be remembered that science itself is without any ultimacy, except upon a complete certainty that all the facts to which its answer relates have been accurately established and that they also are of an absolute nature.

Beyond this, as an incident in the functions of a court trial, it also is entitled to be borne in mind that what usually is involved in a contention of impossibility of

happening on the basis of an injured party's story is an attempt to escape the traditional process for arriving at facts in judicial administration, through evaluation of credibility and weight on the whole evidentiary situation. More concretely stated, what actually is being sought to be reached by the claim of impossibility of happenings is in most cases, as everyone realistically knows who has been engaged in the trial practice, the matter of the integrity of the injured party. But that question, for purposes of judicial functioning, is no less capable and no more difficult of proper resolution in relation to the possibility or impossibility of an accident having occurred as claimed, on the basis of the traditional process of credibility evaluation, than it is in relation to any other fact issue.

3. What was said by the Missouri Supreme Court of a similar contention, in *Doyle* v. *St. Louis Merchants' Bridge Terminal Ry. Co.*, 326 Mo. 425, 31 S. W. 2d 1010, 1012, may in summary be repeated here: "We know from common knowledge that inexplicable happenings do occur. • • • The courts are reluctant to say that declared facts are manifestly impossible or untrue." Or, as more fully expressed by that Court in *Pashea* v. *Terminal R. Ass'n of St. Louis,* 350 Mo. 132, 165 S. W. 2d 691, 694, and reiterated in subsequent cases, "We have often said that 'so frequently do unlooked-for results attend the meeting of interacting forces that courts should not indulge in arbitrary deductions from physical law and fact except when they appear to be so clear and irrefutable that no room is left for the entertainment, by reasonable minds, of any other.'"

Because of the vital part, however, which the traditional process of credibility and weight evaluation serves in judicial function, it is of course important that it be

soundly exercised and that resort not be made to some improper basis or standard in its use in a particular situation—which brings us to the only other contention of defendant that merits discussion here. The contention is that the court's memorandum opinion demonstrates that it did not make a conventional use of the process of credibility and weight evaluation in arriving at the facts but resorted to the application of artificial rules and standards for determining the weight of the evidence in the situation.

Apart from the question of how the accident occurred as a matter of proximate cause, the dominating question on liability in the case was whether such instructions and assurances, as plaintiff claimed, had in fact been given him by defendant's demonstrator-representative. The court's resolution of this fact in favor of plaintiff constituted the pivotal basis for its major finding of negligence against defendant and for its finding of freedom from contributory negligence on the part of plaintiff.

Defendant's demonstrator-representative had testified positively that he never had given plaintiff any such instructions or assurances as plaintiff claimed, nor any other instructions or assurances in regard to the use of the machine; that he never had had any occasion or opportunity to give plaintiff any instructions at all, because plaintiff was not present at the only demonstration which he ever made of the machine for plaintiff's employer prior to the accident; that the only persons present at the demonstration were plaintiff's employer, the implement dealer by whom the machine had been sold to plaintiff's employer, and himself; that the three of them had driven together from the farmhouse of plaintiff's employer out to the field where the baling machine was to be demonstrated, and neither plaintiff nor the em-

ployer's father (who testified in corroboration of plaintiff's story) had accompanied them or subsequently appeared on the scene; that the employer's father was engaged in doing chores in the farmyard at the time they left the house and never came out to the field; that plaintiff, who did not live on his employer's farm and worked for the latter only intermittently, was on that day neither at the house nor any place in the field; that the story of plaintiff, his employer, and the employer's father that the demonstrator-representative had had each of them engage in the task of establishing contact between the twine and the rollers with a handful of hay, by standing on the frame of the machine near the rollers, was false and untrue; that the only person, as previously stated, to whom any demonstration had been made was plaintiff's employer; and that the method shown him and which he had engaged in trying (which method it is unnecessary here to describe) was not the method used by plaintiff at the time of the accident and not one which called for any proximity to the rollers or standing on the frame of the machine.

The implement dealer testified to the same facts as the demonstrator-representative. On the other hand, plaintiff, his employer, and the employer's father all testified that the three of them were present at the demonstration; that the instructions and assurances which plaintiff claimed had been given had in fact been so given to all of them; and that the demonstrator-representative had had each one of them separately and personally undertake the task of engaging the twine with the rollers, under his direct supervision, in the manner that plaintiff claimed.

The court's memorandum opinion indicates that it arrived at the facts out of this conflicting state of testi-

mony on the following basis: "On the factual question, as to whether the plaintiff was in fact instructed as he claims, or as claimed by the defendant, a decision should be made in favor of the plaintiff for the reason that, *under the law,* a witness who testifies to the affirmative of a proposition is ordinarily entitled to be preferred to one who testified to a negative. * * * In analyzing the testimony in the case, the defendant's witness who participated in the demonstration, while they said that the plaintiff and (the employer's father) were not present, *their testimony amounts to a negative, that is, they did not see them.* * * * It could not be well found on the face of the positive testimony of three witnesses [as against the so-called negative testimony of defendant's two witnesses] that the plaintiff was not present at the time the demonstration was made." (Emphasis supplied.) 117 F. Supp. at page 860.

Thus, it would appear that the court treated the testimony of plaintiff's witnesses as constituting positive evidence and that of defendant's witnesses as representing negative evidence only, with the duty resting on it in consequence to accord greater weight to plaintiff's evidence than to defendant's evidence, as a matter of law, such as appears to be suggested by some of the early Missouri cases. For example, in *Henze* v. *St. Louis, K. C. & N. Ry. Co.*, 71 Mo. 636, 639, it was said: "If the witnesses are equally credible, although the number of those who say they did not hear [or see some particular thing] exceeds that of those who say they did, yet the testimony of the latter is to be regarded as establishing the fact, because it is consistent with, and not contradictory of, the negative evidence." Or, again, as declared in *Isaacs* v. *Skrainka*, 95 Mo. 517, 8 S. W. 427, 428, "It is a familiar rule that, where the witnesses are equally credible, the positive evi-

dence that a given thing was said is of more weight than that of others who say they did not hear the alleged statement."

4. We need not stop to examine whether this still is the rule in Missouri, for regardless of what superior weight, if any, positive evidence might otherwise be required to be accorded over negative evidence as a matter of Missouri law, we are unable to see how the court could properly call the testimony of defendant's witnesses in the present situation negative evidence, such as could be subject to any mechanical basis or standard of probative weight.

The testimony of the demonstrator-representative (and also of the implement dealer who cooperated with him in conducting the demonstration) was not to the effect that they had not seen plaintiff at the demonstration; they testified affirmatively and unequivocally as a fact that plaintiff was not at all there. Nor was their testimony a matter of whether they had heard any instructions such as plaintiff claimed had been given; it was a head-on question of whether they themselves had or had not given any such instructions, and whether their story was true or false that no such instructions or assurances had been given by them to anyone, but that on the contrary they had demonstrated, and only had demonstrated, as the proper means of causing the twine to engage with the rollers, an entirely different method, which called for no standing upon the frame of the machine or any proximity to the rotating rollers.

Thus, there was no basis to impose any starting, artificial weight-handicap upon their testimony as a matter of law, but such testimony was entitled to the benefit of the application of the regular process of credibility and weight evaluation in relation to all the other witnesses

and evidence in the case. The application of that process was of further direct importance in the situation as to these witnesses, since their testimony included a claim, denied by plaintiff, that plaintiff had initially stated that the accident accurred when he stepped upon the conveyor to remove a piece of rock therefrom and was caused by the motion of the conveyor to slip and fall against the pressure rollers, and that he had made no claim, until four years later, that the accident had occurred as a result of his attempt to cause the twine to become engaged with the rollers, while standing on the frame of the machine.

5. As said in the recent case of *Owen* v. *Commercial Union Fire Ins. Co. of New York,* 4 Cir., 211 F. 2d 488, 489, "The rule that an appellate court will not disturb findings of fact made by the trial judge unless they are clearly erroneous does not apply if he has committed an error of law which has manifestly influenced or controlled his findings of fact, such as mistake as to the burden of proof"— or, as here, the mistaken according of particular weight to evidence, controlling of a material part of the findings, on the basis of some legal rule which has no application to the class of evidence involved.

The other contentions made by defendant are answered by previous decisions of this Court, which there is no occasion for us to reexamine.

The judgment is reversed and the cause is remanded for a new trial.

Appendix C.

United States Court of Appeals for the Eighth Circuit

Allis-Chalmers Manufacturing Company, a Corporation, Appellant,

vs.

Marvin Wichman.

No. 15069
September Term, 195
Friday, April 1, 195

Appeal from the United States District Court for the Western District of Missouri.

This cause came on to be heard on the record from t United States District Court for the Western Distr of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered a adjudged by this Court, that the judgment of the s District Court, in this cause, be, and the same is herel reversed with costs; and that Allis-Chalmers Manuf turing Company, a Corporation, have and recover agai Marvin Wichman the sum of One Thousand Twenty- and 69/100 Dollars for its costs in this behalf expend and have execution therefor.

And it is further Ordered by this Court that this ca be, and the same is hereby, remanded to the said Distr Court for a new trial.

April 1, 1955.

Exhibit D.

APPELLEE'S PETITION FOR REHEARING.

Appellee respectfully moves the Court to set aside its opinion filed herein on April 1, 1955, and to grant him a rehearing upon the ground that the Court overlooked material matters of law, as shown by its opinion, in ruling that Judge Reeves committed an error of law manifestly influencing or controlling his finding that defendant's agents demonstrated the use of the Roto-baler to plaintiff.

Judge Reeves, it will be remembered, specifically found:

> "5. At the time, an improper and unsafe use of the Roto-baler mentioned in the pleading and the evidence was demonstrated by the agents of the defendant specially assigned for that purpose. The method of pressing hay or straw against a limp twine and the moving of the rollers was demonstrated by said agents, and the plaintiff and purchaser and others were instructed to employ that method.
>
> "6. The plaintiff and C. S. Duncan were present with others at the time such demonstrations were made and such instructions given." (R. 21.)

In his memorandum opinion Judge Reeves said:

> "As indicated, these three witnesses testified positively that the demonstrator or demonstrators, as agents for the defendant and expressly assigned for that purpose, repeatedly demonstrated that method of engaging the twine which was employed by plaintiff and which resulted so tragically." (R. 17.) *Wichman* v. *Allis Chalmers Mfg. Co.*, 117 F. Supp. 857, 860.

But in his memorandum opinion Judge Reeves also stated:

> "1. On the factual question, as to whether the plaintiff was in fact instructed as he claims, or as claimed by the defendant, a decision should be made in favor of the plaintiff for the reason that, under the law, a witness who testified to the affirmative of a proposition is ordinarily entitled to be preferred to one who testifies to a negative. *Stitt* v. *Huidekopers*, 84 U. S. 384.
>
> "In analyzing the testimony in the case, the defendant's witnesses who participated in the demonstration, while they said that the plaintiff and C. S. Duncan were not present, their testimony amounts to a negative, that is, they did not see them. Both of the plaintiff's witnesses, C. S. Duncan, and Donald Duncan, testified positively that the plaintiff and C. S. Duncan were present. Moreover, plaintiff and Donald Duncan reinforced such testimony by saying that Donald Duncan called the plaintiff by 'phone so that he could be present at the demonstration. This was done because the plaintiff was an employee of Donald Duncan and it was apparently understood that he was to operate the machine. Furthermore, it is the rule that a witness is presumed to speak the truth. 70 C. J., Section 915, p. 760. And it is the duty of the trier of a fact to harmonize evidence by assuming on disputed matters that each witness was attempting to tell the truth and that he was mistaken on any factual question rather than committing perjury. It could not be well found on the fact of the positive testimony of three witnesses that the plaintiff was not present at the time the demonstration was made." (R. 16-17.) *Wichman* v. *Allis Chalmers Mfg. Co.*, 117 F. Supp. l. c. 860.

Except for the effect given by this Court to that portion of the memorandum opinion quoted just above, no reason

appears for the reversal and remand ordered, so it becomes of exceeding importance that a proper meaning be given to the language used by Judge Reeves, that it be viewed in a proper legal perspective.

Obviously, Judge Reeves was merely stating some of his reasons for believing the plaintiff's evidence rather than the defendant's evidence. In *Buechle* v. *Montgomery,* 45 Fed. (2d) 987, this Court held, on much authority there cited, that **the memorandum opinion of the trial court which discusses the facts to some extent in setting forth the reasons for his decision is not tantamount to a specific finding of such facts.**

There is a wealth of authority, much of it very recent, on the proposition that positive evidence is to be afforded more weight by the trier of fact than negative evidence. Judge Reeves had a deep and valid reason for citing *Stitt* v. *Huidekopers,* 84 U. S. 384, a case decided almost a century ago. In that case the Supreme Court of the United States noted that there was a sharp conflict in the testimony of the witnesses. It approved this charge which the trial court gave the jury:

> "You should reconcile the testimony, if possible, without imputing falsehood to either affiant. It is a rule of presumptions that ordinarily a witness who testifies to an affirmative is to be preferred to one who testifies to a negative. Why? It is because he who testifies to a negative may have forgotten. It is possible to forget a thing that did happen. It is not possible to remember a thing that never existed." (l. c. 890.)

When *Stitt* is fully and correctly understood, it becomes clear as day that Judge Reeves, an experienced and true trier of the facts, in reconciling the conflicts, preferred to believe that the defendant's witnesses had forgotten that

plaintiff and his witnesses were present at the demonstration, rather than believe that any or all of the witnesses, plaintiff's or defendant's, had sworn falsely.

As the trier of fact, Judge Reeves had an absolute right and was under a duty to reconcile the conflicts in the testimony. He did so in his usual kind and humane manner, in a way that does honor to the sincere and earnest trier of fact. Judge Reeves accounts for the conflicts by saying, in effect, that defendant's witnesses did not remember that plaintiff and his witnesses were present at the demonstration. Testimony by a witness that he does not remember that a certain thing occurred is not positive testimony. It is negative testimony as to its occurrence.

In pointing to *Stitt* as the basis of his reasoning, Judge Reeves made it clear that he chose to believe that defendant's witnesses were mistaken because they had forgotten. "It is possible to forget a thing that did happen," found in our above quotation from *Stitt*. Why else was *Stitt* cited?

Remember, Judge Reeves said: "And it is the duty of the trier of a fact to harmonize evidence by assuming on disputed matters that each witness was attempting to tell the truth and that he was mistaken on any factual question rather than committing perjury. It could not be well found on the fact of the positive testimony of three witnesses that the plaintiff was not present at the time the demonstration was made."

Having written his memorandum opinion with that consideration which marks a gentleman, shall Judge Reeves now be convicted of committing prejudicial error when it is plain to see from his reasoning that neither error nor prejudice resulted?

The trial of this case was long and arduous and costly. Judge Reeves is available. We will be glad if Your Honors,

in the interest of justice, would communicate with Judge Reeves, so that he could say for himself whether or not he used the wrong yardstick in evaluating the evidence after observing the witnesses, as indicated by the opinion filed, or whether his findings, after observing the witnesses, were based on the greater weight of all the credible evidence before him, treating all of the evidence as positive evidence as that term is generally understood, and without regard to its connotation in *Stitt*.

Wherefore, we respectfully pray that the opinion heretofore filed be withdrawn, and appellee be granted a rehearing of this cause, so that his judgment may be affirmed. In the alternative, may we be permitted to suggest, that in the interest of justice, and to save further effort and expense of the parties and a new trial, this cause be remanded to Judge Reeves with instructions that he reconsider all of the evidence in the record and that he follow the principles laid down in the opinion filed in making his finding of the facts, and that he enter judgment in accordance with such findings as may so be made.

Respectfully submitted,

SAM MANDELL,
1111 Scarritt Bldg.,
Kansas City, Missouri,
Of Counsel for Appellee.

CERTIFICATE OF COUNSEL.

I hereby certify that the above petition for rehearing was filed in good faith and believed to be meritorious.

SAM MANDELL,
Of Counsel for Appellee.

32/27

Office - Supreme Court, U. S.
FILED
JUL 22 1955
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954.

No. 205

MARVIN WICHMAN, PETITIONER,

VS.

ALLIS CHALMERS MANUFACTURING COMPANY, A CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF OPPOSING CERTIORARI.

WALTER A. RAYMOND,
1313 Dierks Building,
Kansas City 6, Missouri,
Counsel for Respondent.

ALFRED KURANER and
HARRY R. FREEMAN,
937 Rialto Building,
Kansas City 6, Missouri,
Of Counsel for Respondent.

R. L. MENDENHALL, INC., 924 WYANDOTTE, KANSAS CITY, MO., HARRISON 2030

INDEX

Statement 1

Argument—

I. The Case of *Stitt* v. *Huidekopers*, 84 U. S. 384, Is Without Application to the Facts in This Case for the Reason That Federal Jurisdiction Is Based on Diversity of Citizenship and Missouri State Law Governs the Litigation of This Missouri Accident 2

II. The Trial Court Committed Reversible Error in Ruling the Case on the Principle That the Positive Testimony of Defendant's Witnesses, Drennan and Harlan (That Plaintiff Was Not at the Demonstration and That the Demonstration Did Not Include the Method Described by Plaintiff) Was Negative Testimony and Not Entitled to the Same Weight As Positive Testimony. The Court of Appeals Correctly So Ruled 6

III. The Court of Appeals Correctly Held That the Error in Determining the Weight of the Testimony Also Infected the Assignment As to Failure to Provide the Baler with Protective Devices or Shields, Thus Requiring a New Trial As to Both Issues 8

Table of Cases

Chamberlain v. *Thompson*, Mo. Sup., 256 S. W. 2d 779, 781 6

Erie R. Co. v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817 ..... 3, 4

Fidelity Union Trust Company v. *Field*, 311 U. S. 169, 180, 61 S. Ct. 176, 179 3

Gasoline Products Co. v. *Champlin Refining Co.*, 238 U. S. 494, 500-501, 51 S. Ct. 513 9

Helvering v. *Stuart*, 317 U. S. 154, 164, 63 S. Ct. 140, 146 9
Owens v. *Union Pac. R. Co.*, 319 U. S. 715, 724-725, 63 S. Ct. 1271, 1276 8
Phillips v. *Kurn*, 8 Cir., 145 F. 2d 908, 910 3
Ragan v. *Merchants Transfer & Warehouse Co., Inc.*, 337 U. S. 530, 533, 69 S. Ct. 1233, 1235 3
Stitt v. *Huidekopers*, 84 U. S. 384 2
Swift v. *Tyson*, 16 Pet. 1, 10 L. Ed. 365 (1842) 3, 4
Thompson v. *Camp*, 6 Cir., 167 F. 2d 733 10
Thornburgh v. *Hunkler*, Mo. Sup., 255 S. W. 2d 975 ..... 5, 6
United States v. *Fleischman*, 339 U. S. 349, 365, 70 S. Ct. 739, 747 8
Woods v. *Interstate Realty Co.*, 337 U. S. 535, 538, 69 S. Ct. 1235, 1237 3

TEXTS AND RULES

20 Am. Jur., p. 1041, Evidence, Sec. 1188 5
31 C. J. S., p. 506, Evidence, Sec. 2 5
32 C. J. S., p. 1080, Evidence, Sec. 1037 5
Rule 1 (a) and 1 (b), Revised Rules of the Supreme Court of the United States, 28 U. S. C. A., Rules, 1954 Pocket Parts, p. 12 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954.

No. _____.

MARVIN WICHMAN, PETITIONER,

VS.

ALLIS CHALMERS MANUFACTURING COMPANY, A CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF OPPOSING CERTIORARI.

STATEMENT.

This action is based on an alleged Missouri Tort (Pet. 10, 30). Jurisdiction was in the United States District Court solely because of diversity of citizenship of the parties (Pet. 7, 30). No Federal question was attempted to be raised in the trial court or in the Court of Appeals. No constitutional question was attempted to be raised or even mentioned below or in the Petition for Certiorari or supporting brief or suggestions. Upon analysis it will be seen the issues presented below involved only the local

substantive law of Missouri and any purported applicability of Federal Law, now claimed for the first time, is merely colorable.

Here, for the First time, Petitioner attempts to raise the point that the error for which the Court of Appeals reversed and remanded the case did not affect one ground of alleged liability; hence; it is claimed, the error was not prejudicial or reversible and under applicable Federal Procedure the judgment below should have been affirmed (Pet. 18, 45-49). The Court of Appeals found (Pet. 39, 43), and Respondent here contends, that the issues on the two grounds of alleged liability and the defenses of contributory negligence made thereto were so interrelated and interwoven as to affect "A material part of the findings" thus requiring a new trial as to all issues.

None of the alleged grounds for certiorari fall within any of the classes specified in Rule 19, Paragraphs 1 (a) and 1 (b) of this Court. Revised Rules of the Supreme Court of the United States, 28 U. S. C. A., Rules, 1954 Pocket Parts, p. 12.

ARGUMENT.

I.

The Case of Stitt v. Huidekopers, 84 U. S. 384, Is Without Application to the Facts in This Case for the Reason That Federal Jurisdiction Is Based on Diversity of Citizenship and Missouri State Law Governs the Litigation of This Missouri Accident.

Jurisdiction of the United States District Court was based on diversity of citizenship (Pet. 14, 30, 35).

The occurrence out of which this action arose took place in the State of Missouri (Pet. 32).

The substantive law of Missouri therefore governs in this case. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817; *Woods* v. *Interstate Realty Co.,* 337 U. S. 535, 538, 69 S. Ct. 1235, 1237; *Ragan* v. *Merchants Transfer & Warehouse Co. Inc.,* 337 U. S. 530, 533, 69 S. Ct. 1233, 1235; *Fidelity Union Trust Company* v. *Field,* 311 U. S. 169, 180, 61 S. Ct. 176, 179.

Local law governs as to the burden of proof, contributory negligence and sufficiency of the evidence to make a case. *Woods* v. *Interstate Realty Co.,* 337 U. S. 535, 538, 69 S. Ct. 1235, 1237.

Local law also governs as to the sufficiency and weight of negative testimony. *Phillips* v. *Kurn,* 8 Cir., 145 F. 2d 908, 910.

Whether or not the testimony of defendant's witnesses, Drennan and Harlan (that plaintiff was not present at the demonstration of the baler put on by them and that they did not at that time demonstrate the method plaintiff and his witnesses testified to), was negative evidence, and the weight to be given to it, was a question of Missouri law and not of Federal law. The Court of Appeals properly so considered it and reached its decision on the basis of Missouri law (Pet. 34, 41, 42). The Court of Appeals did not "Fail to appreciate the ruling of this court in Stitt, or else failed to properly apply that rule" as claimed on page 17 of the Petition herein. The Court of Appeals simply did not apply that decision because it was not the applicable or governing law.

The Stitt case was decided at the October Term, 1873, and during the reign of the doctrine of *Swift* v. *Tyson,* 16 Pet. 1, 10 L. Ed. 365 (1842), to the effect that in the absence of a local statute, federal courts are free to exercise their independent judgment as to what the law is. The doctrine

of *Swift* v. *Tyson* was overruled in 1938 by the case of *Erie R. Co.* v. *Tompkins, supra,* announcing the rule that local substantive law of the state governs cases in the Federal Courts because of jurisdiction based on diversity of citizenship. That ruling precludes the applicability of the Stitt decision to this case.

The Court of Appeals found it unnecessary to determine what the law of Missouri was as to negative testimony (Pet. 42) for the reason that it found this testimony was not negative testimony (Pet. 42).

The exact language of the Court of Appeals is (Pet. 42): "* * * we are unable to see how the court could properly call the testimony of defendant's witnesses in the present situation negative evidence, such as could be subject to any mechanical basis or standard of probative weight.

> "The testimony of the demonstrator-representative (and also of the implement dealer who cooperated with him in conducting the demonstration) was not to the effect that they had not seen plaintiff at the demonstration; they testified affirmatively and unequivocally as a fact that plaintiff was not at all there. Nor was their testimony a matter of whether they had heard any instructions such as plaintiff claimed had been given; it was a head-on question of whether they themselves had or had not given any such instructions, and whether their story was true or false that no such instructions or assurances had been given by them to anyone, but that on the contrary they had demonstrated, and only had demonstrated, as the proper means of causing the twine to engage with the rollers, an entirely different method, which called for no standing upon the frame of the machine or any proximity to the rotating rollers."

The decision of the Court of Appeals is amply supported by authority. In 20 Am. Jur., p. 1041, Evidence, Sec. 1188, it is stated:

> "* * * Where a witness affirmed that a fact occurred, and another who had apparently sufficient opportunity to know and who declares he was paying attention denies that it occurred, it is generally held not to be a case of positive and negative testimony, but of positive testimony on both sides. * * *."

In 31 C. J. S., p. 506, Evidence, Sec. 2, it is stated:

> "* * * Evidence is positive where the witness states that a certain thing did or did not happen or exist, and negative where the witness states that he did not see or know of the happening or existence of a circumstance or fact. * * *."

In 32 C. J. S., p. 1080, Evidence, Sec. 1037, it is stated:

> "* * * A distinction must be made between testimony which is negative in form and that which is negative in character; so testimony may be positive in character even though it amounts to a negative statement or tends to show a negative situation, and if a witness who was in a position to observe testifies not merely that he did not see or hear, but that the event did not occur, this is clearly positive testimony. * * *."

In the case of *Thornburgh* v. *Hunkler*, Mo. Sup., 255 S. W. 2d 975, the Supreme Court of Missouri cited with approval and followed the above statements of the law in American Jurisprudence and Corpus Juris Secundum.

In the Thornburgh case plaintiff, a school boy, testified that the defendant who was operating the school bus in keeping order among the pupils on the bus jammed or pushed another boy into the seat beside plaintiff in such a way as to injure plaintiff. Defendant did not learn

plaintiff claimed to have been hurt until six months after the alleged occurrence. Defendant testified that he did not have any independent recollection of the occurrence but testified: "I never pushed that boy."

In affirming a judgment for defendant driver the court said (255 S. W. 2d l. c. 977):

> "His testimony that he never pushed Teddy Smith into a seat was positive testimony although negative in form."

See to like effect *Chamberlain* v. *Thompson*, Mo. Sup., 256 S. W. 2d 779, 781.

In ruling that this testimony was not negative but positive the Court of Appeals therefore correctly applied Missouri law, which is also the general law of the majority of other jurisdictions.

II.

The Trial Court Committed Reversible Error in Ruling the Case on the Principle That the Positive Testimony of Defendant's Witnesses, Drennan and Harlan (That Plaintiff Was Not at the Demonstration and That the Demonstration Did Not Include the Method Described by Plaintiff) Was Negative Testimony and Not Entitled to the Same Weight As Positive Testimony. The Court of Appeals Correctly So Ruled.

We cannot better answer Petitioner's claim that this error of the court did not constitute prejudicial error calling for reversal and remand (Pet. 5-6) than to quote the opinion of the Court of Appeals as follows (Pet. 40-41):

> "The Court's memorandum opinion indicates that it arrived at the facts out of this conflicting state of testimony on the following basis: ' "On the factual question, as to whether the plaintiff was in fact in-

structed as he claims, or as claimed by the defendant, a decision should be made in favor of the plaintiff for the reason that, under the law, a witness who testifies to the affirmative of a proposition is ordinarily entitled to be preferred to one who testified to a negative. * * * In analyzing the testimony in the case, the defendant's witness who participated in the demonstration, while they said that the plaintiff and (the employer's father) were not present, their testimony amounts to a negative, that is, they did not see them. * * * It could not be well found on the face of the positive testimony of three witnesses (as against the so-called negative testimony of defendant's two witnesses) that the plaintiff was not present at the time the demonstration was made." (Emphasis supplied). 117 F. Supp., at page 860.

Thus, it would appear that the court treated the testimony of plaintiff's witnesses as constituting positive evidence and that of defendant's witnesses as representing negative evidence only, with the duty resting on it in consequence to accord greater weight to plaintiff's evidence than to defendant's evidence, as a matter of law, such as appears to be suggested by some of the early Missouri cases. * * *.'"

The Court of Appeals found that this error prejudicially affected the issues of negligence and contributory negligence as to the failure to place guards on the baler as well as prejudicially affecting the issue of negligent instruction and demonstration (Pet. 39); that the error affected a "material part of the findings" (Pet 43) as will be more fully developed under the next point in this brief.

III.

The Court of Appeals Correctly Held That the Error in Determining the Weight of the Testimony Also Infected the Assignment As to Failure to Provide the Baler With Protective Devices or Shields, Thus Requiring a New Trial As to Both Issues.

We submit this issue is not before this court in this proceeding because it was not raised in Petitioner's Petition for Rehearing in the Court of Appeals and was not passed on by that court (Pet. 45-49).

We understand it to be the practice of this Court to refuse to pass on a point not raised and passed on in the Court of Appeals but raised for the first time in this Court. *Owens* v. *Union Pac. R. Co.*, 319 U. S. 715, 724-725, 63 S. Ct. 1271, 1276; *United States* v. *Fleischman*, 339 U. S. 349, 365, 70 S. Ct. 739, 747.

To demonstrate that the Court of Appeals found the error prejudically affected both issues (negligent demonstration and instruction and failure to provide the baler with protective devices or shields) we quote from the opinion of the Court of Appeals as follows: (Pet. 39) "* * * Apart from the question of how the accident occurred as a matter of proximate cause, the dominating question on liability in the case was whether such instructions and assurances, as plaintiff claimed, had in fact been given him by defendant's demonstrator-representative. The court's resolution of this fact in favor of plaintiff constituted the pivotal basis for its major finding of negligence against defendant and for its finding of freedom from contributory negligence on the part of plaintiff. * * *"

The Court of Appeals found this case was an exception to the rule that the findings of fact by the trial Court usually would not be disturbed on appeal, pointing out that

the court had committed an error of law which had manifestly influenced or controlled his findings of fact, "as here, the mistaken according of particular weight to evidence, controlling of a material part of the findings, on the basis of some legal rule which has no application to the class of evidence involved." (Pet. 43).

In the case of *Helvering* v. *Stuart*, 317 U. S. 154, 164, 63 S. Ct. 140, this Court said (l. c. 146):

> "If reasonably avoidable we should certainly avoid becoming a Court of first instance for the determination of the varied rules of local law prevailing in the forty-eight states."

As pointed out by the Court of Appeals (Pet. 39) quoted above, "whether the instructions and assurances, as plaintiff claimed, had in fact been given him by defendant's demonstrator-representative" "constituted the pivotal basis for its major finding of negligence against the defendant and for its finding of freedom from contributory negligence on the part of the plaintiff." The issue of plaintiff's contributory negligence was pressed by defendant as a defense to the charge of negligence in failing to provide the baler with protective devices or shields as well as to the charge of negligent demonstration and assurance. The Court of Appeals properly found the issues were so interwoven as to require a new trial. In so ruling the Court of Appeals applied the rule laid down in the Federal Courts.

In the case of *Gasoline Products Co.* v. *Champlin Refining Co.*, 238 U. S. 494, 500-501, 51 S. Ct. 513, the Court stated the law thus (l. c. 515):

> "Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be

had without injustice. See *Norfolk Southern R. Co.* v. *Ferebee,* 238 U. S. 269, 274, 35 S. Ct. 781, 59 L. Ed. 1303; *American Locomotive Co.* v. *Harris,* (C. C. A.) 239 Fed. 234, 240; *Simmons* v. *Fish, supra,* 210 Mass., page 568, 97 N. E. 102, Ann. Cas. 1912D, 488; *General Motors Co.* v. *Shepard Co.,* 47 R. I. 153, 156, 130 Atl. 593; *Le Febvre's Administrator* v. *Central Vermont Ry. Co.,* 97 Vt. 342, 358, 123 Atl. 211. Here the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial. See *Simmons* v. *Fish, supra.* There should be a new trial of all the issues raised by the counterclaim."

The issues of the two theories of liability for negligence and the defenses to each of contributory negligence which would bar recovery are so interwoven and intermingled in this case that the error must have affected all such issues resulting in a denial of a fair trial just as the Court of Appeals held (Pet. 39, 43).

In the case of *Thompson* v. *Camp,* 6 Cir., 167 F. 2d 733, the Court, although limiting the issues on retrial in the particular case, stated the law as follows (l. c. 734):

> "* * * It is recognized that in exercising this right of limiting the retrial to a single issue where the other issues have previously been properly submitted and determined by a jury, the Court should proceed with caution, with a careful regard to the rights of both parties and only in those cases where it is plain that the error which has crept into one element of the verdict did not in any way affect the determination of any other issue. * * *"

Here the Court of Appeals found the error affected the issues of liability and the defense of contributory negligence made thereto so as to affect the determination of

all such issues and require a new trial of all the issues. Even had this issue been timely and properly raised, we submit it is without merit.

For all the reasons set forth above Respondent respectfully asks that the Petition for Certiorari herein be denied as without merit.

Respectfully submitted,

WALTER A. RAYMOND,
1313 Dierks Building,
Kansas City 6, Missouri,
Counsel for Respondent.

ALFRED KURANER and
HARRY R. FREEMAN,
937 Rialto Building,
Kansas City 6, Missouri,
Of Counsel for Respondent.